

UNITED STATES OF AMERICA,) 2:06-cr-00367-HDM-PAL
) 2:12-cv-02201-HDM
 Plaintiff,)
)
 vs.) ORDER
)
 ELLIOTT DAUGHERTY,)
)
 Defendant.)
)


As noted in the court's orders dismissing defendant's second or successive § 2255 petitions, the court may not consider a second or successive § 2255 motion absent a certificate from the Court of Appeals authorizing it to do so. 28 U.S.C. § 2255(h); *id.* § 2244; *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011).

1 Defendant, however, argues that he is permitted to file his second
2 or successive petition pursuant to § 2255(f)(3) without first
3 obtaining authorization from the Court of Appeals pursuant to §
4 2255(h).

5 Section 2255(f)(3) requires that § 2255 motions be filed
6 within one year of "the date on which the right asserted was
7 initially recognized by the Supreme Court, if that right has been
8 newly recognized by the Supreme Court and made retroactively
9 applicable to cases on collateral review." Defendant asserts that
10 the Supreme Court's decisions in *Missouri v. Frye*, - U.S. -, 132 S.
11 Ct. 1399 (2012), and *Lafler v. Cooper*, - U.S. -, 132 S. Ct. 1376
12 (2012) created newly recognized rights retroactively applicable to
13 cases on collateral review.

14 Section 2255(f)(3) governs only the time within which § 2255
15 motions may be filed. It does not create a right to file a second
16 or successive petition without first obtaining authorization from
17 the Court of Appeals. See *Buenrostro v. United States*, 697 F.3d
18 1137, 1140 (9th Cir. 2012). Plaintiff's § 2255 petition in this
19 case is a second or successive petition. Further, the Ninth
20 Circuit has held that neither *Lafler* nor *Frye* created a new rule of
21 constitutional law so neither "can form the basis for an
22 application for a second or successive motion." *Id.* at 1140. For
23 those reasons, defendant's motion for reconsideration (#77) is
24 **DENIED.**

25 DATED: This 28th day of March, 2013.

26 
27

28 UNITED STATES DISTRICT JUDGE